Fired on the (Hot) Spot?

How California's Right to Privacy May Protect Employees From Blog-Based Termination

By Paul Torio

Introduction

The California Constitution expressly guarantees to every individual, regardless of the defendant's status, the right to privacy.[1] Any potential claims of privacy infringement, therefore, may be directed against either a state or non-governmental actor.[2] Such an expansive privacy right may potentially offer the most valuable argument for some California public and private employees who are contesting job dismissals premised on their conduct. What makes the privacy claim worthwhile to pursue for these particular workers is that their conduct occurs *entirely* outside of the physical workplace, perhaps at home, a library, a café, or another "hotspot."[3]

Recently, the issue of employee privacy has attracted heightened attention as companies' increasing dependence on computer technologies, most notably the Internet, has been accompanied by numerous accounts of employee terminations for improper use of such technologies. [4] Employers primarily justify these disciplinary decisions as business necessities: an employee who spends an excessive amount of his working hours online for non-work-related reasons tends to be a counterproductive one and must subsequently be discharged for wasting company resources.[5] On the whole, California courts have sided with employers and rejected

[1] *See* CAL. CONST. art. 1, § 1 ("*All people* are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.") (emphasis added).
[2] *See Hill v. NCAA*, 7 Cal. 4th 1, 15-20 (1994).
[3] A "hotspot" describes any place "covered by a Wi-Fi (802.11) wireless access point." PC Magazine Encyclopedia, http://www.pcmag.com/encyclopedia_term/0,2542,t=HotSpot&i=44405,00.asp (last visited July 30, 2008).
[4] *See* Stephen D. Lichtenstein & Jonathan J. Darrow, *Employment Termination for Employee Blogging: Number One Tech Trend for 2005 and Beyond, or a Recipe for Getting Dooced?*, UCLA J.L. & TECH., Fall 2006, at 1, 2-3.
[5] *But see* Larry O. Natt Gantt, II, *An Affront to Human Dignity: Electronic Mail Monitoring in the Private Sector Workplace*, 8 HARV. J.L. & TECH. 345, 419-424 (1995) (suggesting that prohibiting Internet usage monitoring by private sector employers actually enhances employee productivity).

invasion of privacy claims when an employee's challenged Internet activity occurs within the jobsite and/or involves company-issued computers.[6]

However, the justifications underpinning this judicial deference toward California employers, including workers' diminished expectations of privacy,[7] weaken considerably when the challenged activity takes place outside of the office and on an employee's personal computer. Under these circumstances, discharged employees may rightfully invoke their constitutional right to privacy as the grounds for a wrongful termination lawsuit.[8] Such circumstances consistently exist when an employee is dooced, i.e., fired for blogging.

Decrypting the Jargon: "Blogs" & "Doocing"

A "blog," short for Internet weblog, is a website upon which a person chronologically posts entries on diverse topics and that sometimes allows third parties to comment on and respond to these entries.[9] With the advent of user-friendly automated publishing systems that also marketed anonymity, both the quantity and popularity of blogs skyrocketed throughout the 1990s.[10] Today, it is estimated that a new blog is created every 7.4 seconds.[11]

Unfortunately, blogging has also introduced an adverse consequence for California employees: the proliferation of blog-based terminations, or "doocing."[12] Understandably, companies are eager to dooce workers who blog about job-related matters that may harm the

[6] *See, e.g.*, *TBG Ins. Servs. Corp. v. Superior Court*, 96 Cal. App. 4th 443 (2002) (holding that an employee has no reasonable expectation of privacy if he uses a business-provided home computer for personal matters).
[7] See discussion *infra* "The Case for Wrongful Doocing, Part II: Privacy."
[8] *See* discussion *infra* "The Case for Wrongful Doocing, Part I: *Tameny*."
[9] Lichtenstein, *supra* note 4, at 1.
[10] Konrad S. Lee, *Hiding From the Boss Online: The Anti-Employer Blogger's Legal Quest for Anonymity*, 23 SANTA CLARA COMPUTER & HIGH TECH. L.J. 135, 137 (2006).
[11] *Id.* at 137, 139.
[12] *See generally* Marion McWilliams & Alison Neufeld, *Internet Use and Getting 'Dooced': Regulating Employees' Online Speech*, CAL. PUB. EMPLOYEE RELATIONS J., Feb. 2008, at 5, 6 ("This term originated from one of the first-reported blog-related terminations, that of Heather Armstrong. She was fired from her job as a web designer after she posted comments about her company and the office holiday party on her website—Dooce.com.").

business.[13] Yet, workers who blog on non-job-related subjects, who conscientiously password-protect their sites and conceal their identities, or who do not even maintain a blog at all may still find themselves subject to disciplinary action.[14]

A genuine concern arises regarding the extent to which an employer may effectively regulate the online activity of its employee before such regulation encroaches upon the employee's fundamental right to privacy. This concern is certainly warranted when an employer seeks to deprive an employee of his livelihood on the basis of blog entries composed on a privately-owned laptop outside the confines of the office.[15] Regrettably, current California case law remains sparse on the issues of doocing and the right to privacy.[16] However, the courts have previously fashioned a cause of action that can be used to tackle these issues: the *Tameny* claim.

The Case for Wrongful Doocing, Part I: *Tameny*

In California, a dismissed employee may contest his firing on the grounds that it "violates fundamental principles of public policy."[17] This "wrongful discharge" cause of action, also known as a *Tameny* claim,[18] has been used successfully to insulate at least four categories of employee conduct perceived to be in the public interest: (1) whistle-blowing, (2) refusing to commit illegal acts, (3) performing mandated duties, and (4) *exercising a statutory or*

[13] *See* Lee, *supra* note 10, at 139-40.
[14] *Cf.* KIMM WALTON, GUERRILLA TACTICS FOR GETTING THE LEGAL JOB OF YOUR DREAMS 856-57 (2d ed. 2008). In one of Ms. Walton's [title] anecdotes, she recalls the story of a law student who applied for a position with an unnamed federal agency. *Id.* At the end of the interview, the student was shown a print-out of his friend's password-secured private blog, which detailed their exploits on a recent vacation. *Id.*
[15] *See* Lichtenstein, *supra* note 4, at 8.
[16] *See generally* Shawn M. Swansonn & Patrick Shermann, *What Employers Should Know (and Do) About Blogs*, BENDER'S CAL. LAB. & EMP. BULL., Oct. 1, 2005, at 1.
[17] *Tameny v. Atlantic Richfield Co.*, 27 Cal. 3d 167, 170 (1980). The *Tameny* court developed this cause of action to limit employers' seemingly unfettered power under common law to fire "at-will" employees. *See id.* at 172; Erich Shiners, *Keeping the Boss Out of the Bedroom: California's Constitutional Right of Privacy as a Limitation on Private Employers' Regulation of Employees' Off-Duty Intimate Association*, 37 MCGEORGE L. REV. 450, 473 (2006) ("California was the first state to recognize a tort claim for wrongful discharge in violation of public policy.").
[18] *See* Shiners, *supra* note 17, at 473.

constitutional right or privilege.[19] Employee actions falling outside of these four categories rarely satisfy the elements of the *Tameny* claim.[20] As an express constitutionally-mandated right, California's right to privacy clearly falls within this final category.[21]

In order to succeed on a *Tameny* claim, the public policy cited by the employee and allegedly contravened by that employee's dismissal must (1) be bound to fundamental policies delineated in constitutional or statutory provisions, (2) be "public" in the sense that it affects society at large, (3) have been articulated at the time of dismissal, and (4) be fundamental and substantial.[22] California's right to privacy undeniably satisfies the first and last prongs by virtue of its constitutional standing.[23] Furthermore, the right has been firmly established for decades by the state's legislative and the judicial branches.[24] Finally, although at least one California decision held that the right to privacy does not meet the "public" prong of the *Tameny* test, due mainly to semantic nonsense,[25] later decisions recognized that an unalienable right, such as the right to privacy, inures to the general public and, subsequently, its enforcement benefits everyone.[26]

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[19] *See* Lichtenstein, *supra* note 4, at 7-8.

[20] *See, e.g.*, Jason Bosch, Note, *None of your Business (Interest): The Argument for Protecting All Employee Behavior With No Business Impact*, 76 S. CAL. L. REV., 639, 653 (2003) ("Accordingly, this exception has never been used to protect general employee autonomy where the autonomy in question is not backed by a specific legal provision strong enough to create a 'public policy.'").

[21] Some authors regard privacy as a separate category that may not constitute public policy for the purposes of the *Tameny* claim. *See id.* at 8.

[22] *Silo v. CHW Med. Found.*, 27 Cal. 4th 1097, 1104 (2002).

[23] *See supra* note 1; *Porten v. University of San Francisco*, 64 Cal. App. 3d 825, 829 (1976). Compare *Griswold v. Connecticut*, 381 U.S. 479 (1965), for a discussion of the implicit but fundamental constitutional right to privacy established by the U.S. Supreme Court.

[24] *See, e.g.*, Shiners, *supra* note 17, at 454-55 (recounting passage of Proposition 11, the Privacy Initiative, in 1972). The fact that the Privacy Initiative has not been rescinded also attests to the continuing longevity of the right.

[25] *Luck v. S. Pac. Transp. Co.*, 218 Cal. App. 3d 1, 29 (1990) ("The right to privacy is, by its name, a private right, not a public one.").

[26] *See Pettus v. Cole*, 49 Cal. App. 4th 402, 456-57 (1996); *Feminist Women's Health Ctr. v. Superior Court*, 52 Cal. App. 1234, 1245 (1997) ("[T]he constitutional right to privacy forms a sufficient touchstone of public policy to support . . . wrongful termination claim[s].") (alterations added) (citation omitted).

In addition to complying with the *Tameny* test, the right to privacy is probably the strongest legal argument remaining that both public and private California employees can make pursuant to the wrongful discharge action, even more so since recent judgments had eviscerated two legislative provisions that, on the surface, could have either could have qualified as a statutory privilege under *Tameny* or provided an entirely independent cause of action In 1999, the California legislature amended California Labor Code section 96 to read that the Labor Commissioner shall take assignments of "[c]laims for loss of wages as the result of demotion, suspension, or discharge from employment for *lawful conduct* occurring during nonworking hours away from the employer's premises."[27] A companion provision, California Labor Code section 98.6, read similarly that "[n]o person shall discharge an employee . . . because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96 . . . ."[28]

The plain language of sections 96(k) and 98.6 suggested that employees would be immunized against termination for any activity committed outside the workplace, such as blogging, that is not expressly illegal.[29] However, this view was rejected outright by the California Courts of Appeal. In *Barbee v. Household Automotive Finance Corp.*, the court held that section 96(k) "[did] not set forth an independent public policy that provides employees with any substantive rights, but rather, merely establishes a procedure by which the Labor Commissioner may assert, on behalf of employees, *recognized constitutional rights*."[30] Likewise, section 98.6 did not "adequately support[] a public policy against a private employer's

[27] CAL. LAB. CODE § 96(k) (2008) (alteration added) (emphasis added). *See also* Shiners, *supra* note 17, at 468-73.
[28] CAL. LAB. CODE § 98.6(a) (2008) (alteration added) (citation omitted). *See also* Shiners, *supra* note 17, at 468-73.
[29] *See* Shiners, *supra* note 17, at 469.
[30] 113 Cal. App. 4th 525, 533 (2003) (alteration added) (emphasis added). *See also* Shiners, *supra* note 17, at 481-82.

termination of an employee for the employee's law conduct . . . occurring during nonworking hours away from the employer's premises."[31]

Given the potential expansiveness of the language and the risk that such language may encourage a deluge of meritorious and frivolous wrongful discharge lawsuits, the California Courts of Appeal probably ruled appropriately in constraining the scope of these labor provisions. At the same time, unfortunately, *Barbee* and *Grinzi* also blocked a viable avenue for employees to challenge doocing practices directly. Consequently, the privacy-based *Tameny* claim appears to be the best available option.[32]

The Case for Wrongful Doocing, Part II: Privacy

So far, the analysis has focused exclusively on whether California's constitutional right to privacy would satisfy the elements of a *Tameny* claim. Concluding that the requirements would be met, the analysis necessarily shifts to a new question: whether doocing constitutes a violation of an employee's right to privacy. Absent this showing, a *Tameny* claim cannot be utilized to battle the blog-based termination.[33] To state a prima facie case for invasion of privacy in California, a plaintiff must establish (1) a legally-protected privacy interest, (2) a reasonable expectation of privacy under the circumstances, and that (3) the defendant's conduct seriously invades the privacy interest.[34] Fortunately, each of these elements relies heavily on the particular

[31] *Grinzi v. San Diego Hospice Corp.*, 120 Cal. App. 4th 72, 88 (2004) (alteration added) (citation omitted). *See also* Shiners, *supra* note 17, at 481-82.
[32] Other legal channels may exist to protect employee bloggers that are outside the scope of this paper, including freedom of speech and collective bargaining labor laws. However, in contrast to California's right to privacy, they do not safeguard *every* employee from wrongful terminations. *See supra* note 1. Moreover, California is one of only ten states to expressly recognize privacy in its constitution. *See* National Conference of State Legislatures, Privacy Protections in State Constitutions, http://www.ncsl.org/programs/lis/privacy/stateconstpriv03.htm (last visited July 31, 2008). Given the high level of deference typically afforded to constitutional rights, the constitutional privacy right may end up being an easier action to pursue.
[33] *See* sources cited *supra* note 26.
[34] *See Hill*, 7 Cal. 4th at 39-40.

facts of a litigant's case.[35] As a result, depending on the types of events surrounding an employee's doocing, scenarios will exist that fit the prima facie requirements.

First, California's right to privacy encompasses an individual's right to be left alone.[36] This idea of "intrusion upon seclusion" implicates the activities of those off-duty workers who blog on personal computers, especially those who blog anonymously and/or encrypt their sites so as to avoid identification and discovery via Web browsers.[37] Also, a blogger may claim that the mere threat of doocing threatens his autonomy privacy[38] since the prospect of termination could effectively coerce him into adhering to a standard of conduct while off the job. Clearly, privacy interests are easy to identify.[39]

Second, an employee blogger may possess a reasonable expectation of privacy as long as he takes certain precautions to screen his prospective audience. The main feature of a blog, after all, is to express one's thoughts and opinions on the Internet, a forum that is accessible worldwide.[40] However, the fact that an area is accessible to the public at large does not automatically diminish or eliminate a reasonable privacy expectation.[41] Furthermore, if an employee can demonstrate that he took measures to restrict his employer's access to his blog,

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[35] *See id.* at 34 ("The particular context, i.e., the specific kind of privacy interest involved and the nature and seriousness of the invasion and any countervailing interests, remains the critical factor in the analysis. Where the case involves an obvious invasion of an interest fundamental to personal autonomy, e.g., freedom from involuntary sterilization or the freedom to pursue consensual familial relationship, a 'compelling interest' must be present to overcome the vital privacy interest. If, in contrast, the privacy interest is less central, or in bona fide dispute, general balancing tests are employed."). While prior California cases do not propose this kind of fluidity, the *Hill* opinion positively controls. *See id.* at 55 n.20.

[36] *See Porten*, 64 Cal. App. 3d at 828 (intrusion upon physical solitude or seclusion); RESTATEMENT (SECOND) OF TORTS § 652B (1977).

[37] For instance, a simple search using a browser such as Google.com can display a number of websites containing the search terms entered, such as a person's name..

[38] *See Hill*, 7 Cal. 4th at 36 (finding that privacy safeguards certain personal decisions from interference).

[39] See *White v. Davis*, 13 Cal. 3d 757 (1975), for a detailed discussion about the policy supporting passage of the Privacy Initiative in 1972, including statements that privacy intends to protect emotions, expressions, personalities, and the ability to control circulation of personal information.

[40] *See* Lichtenstein, *supra* note 4, at 16.

[41] *Cf. Katz v. United States*, 389 U.S. 347 (1967) (holding that plaintiff's expectation of privacy may be protected pursuant to the Fourth Amendment in publicly-accessible areas such as telephone booths).

such as by only blogging outside of the workplace when he is off-duty, requiring entry passwords, and posting anonymously and without any explicit reference to his employment, his privacy expectation against intrusion is buttressed.[42] Even an employee's diminished privacy expectation is not necessarily fatal to his claim.[43]

Last, assuming that an employee meticulously guards his blog site, he can realistically argue that an employer's intrusion rises to the level of "serious." The principal California Supreme Court case dealing with the right to privacy, *Hill v. NCAA*, reiterates that that an invasion must be sufficiently serious "in [its] nature, scope, and actual or *potential* impact to constitute an egregious breach of the social norms underlying the privacy right."[44] At the outset, to allow any person to hack and obtain information intended to be confidential diametrically contradicts the spirit of the right to privacy.[45] Thus, infiltration of an employee's secured blog by an employer compels a similar sense of gravity. Also, the scope of such an intrusion seems too attenuated as it goes far beyond an employee's responsibilities in the workplace. While legitimate reasons may indeed motivate employers to closely scrutinize particular members of its workforce, there are less intrusive alternatives to probing employees' off-duty behavior that does not involve the use of company technology or other resources.[46]

Moreover, the potential repercussions of invasion of online privacy have become global, national, and local concerns. For instance, rampant human rights violations resulting from relentless Internet surveillance of political dissidents by the government of the People's Republic

[42] In all likelihood, an objective person would find that an employer who infiltrates an employee's password-protected blog encroaches upon that employee's privacy right. *See Hill*, 7 Cal. 4th at 37.
[43] *See id.* at 43 (seriousness of invasion offsets effect of diminished expectation of privacy by advance notice).
[44] *Id.* at 39-40 (emphasis added).
[45] *See infra* note 39.
[46] *See* discussion *infra* "Doocing Justified? *Hill*'s Competing Interest Balancing Test."

of China have provoked the ire of the international community.[47] In response, the United States enacted statutory provisions regulating the export of certain networking devices and computer technologies that could be used to further subjugate freedom of speech and press in China and other repressive regimes.[48] Likewise, prevention of privacy invasion online has become a high priority in California, which has itself recently passed several expansive privacy statutes.[49] While doocing does not typically induce the same amount of outrage as that expressed over the current situation in China, it is still premised on a detrimental view of control. More importantly, the potential consequence of privacy invasion in the doocing context is obvious and significant: the deprivation of a person's livelihood.

Doocing Justified? *Hill*'s Competing Interest Balancing Test

In general, off-duty conduct such as blogging seems to minimally affect an employer's business.[50] Nonetheless, like all rights, the right to privacy is far from absolute. *Hill* provides that it needs to be "carefully compared with competing or countervailing privacy and nonprivacy interests in a 'balancing test.'"[51] The comparison and balancing of diverse interests is central to the privacy jurisprudence of both common and constitutional law." The authority given to these

[47] *See generally* GREG WALTON, CHINA'S GOLDEN SHIELD: CORPORATIONS AND THE DEVELOPMENT OF SURVEILLANCE TECHNOLOGY IN THE PEOPLE'S REPUBLIC OF CHINA (2001).
[48] *See generally* 50 U.S.C. app. § 2405(n) (2008); 22 U.S.C. § 2151 (2008); 22 U.S.C. §2304(a)(2) (2008).
[49] *See* Security Breach Information Act, CAL. CIV. CODE § 1798.82 (2007); Online Privacy Protection Act (OPPA), CAL. BUS. & PROF. CODE §§ 22575-22579 (2007); Financial Information Privacy Act (FIPA), CAL. FIN. CODE §§ 4050-4060 (2007).
[50] *See* CAL. CODE REGS. tit. 22, § 1256-33 (2008) ("Usually, the off-the-job activity of an employee does not injure or tend to injure the employer's interests. If there is no injury or potential injury to the employer's interests, the employer cannot reasonably impose the employer's standards of behavior on an employee during his or her off-duty time.").
[51] *Hill*, 7 Cal. 4th. At 37. This balancing test differs from previous versions. *See, e.g.*, *id.* at 38-39 (suggesting that balancing favors private entity defendants over government agency defendants).

competing interests "is determined by their proximity to the central functions of a particular pubic or private enterprise."[52]

When blogging occurs off-duty both outside of the workplace and on personal computers, concerns over potential office network breaches and decreased productivity caused by the activity itself substantially lessen. On the other hand, an employer may demonstrate valid business interests when doocing is based on the content of the employee's blog. Work-related posts that openly discuss the trade secrets and other confidential business information are one such example.[53] Non-work-related posts that may expose the employer to liability due to defamation, hate speech, and harassment are another.[54] Apart from these, it is difficult to contemplate other business-related justifications that would warrant an invasion of blog privacy.[55] So long as that blogger performs his job well, fairness requires that he should not be dismissed for activity unrelated to his functions and that has little bearing on the employer.[56]

Assuming that a business interest is present, an employer must still prevail on a balancing test that pits that interest against an employee's fundamental privacy interest.[57] In addition, even if the balancing test favors a defendant-employer's interests, the plaintiff-employee can still rebut these proffered interests by "demonstrating the availability and use of protective measures, safeguards, and alternatives to defendant's conduct that would minimize the intrusion of privacy

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[52] *Id.* at 38.
[53] *See* Lichtenstein, *supra* note 4, at 3-4.
[54] *Cf.* Peter J. Isajiw, Comment, *Workplace E-Mail Privacy Concerns: Balancing the Personal Dignity of Employees with the Proprietary Interests of Employers*, 20 TEMP. ENVTL. L. & TECH. J. 73, 76-77 (2001).
[55] For instance, assertions that a valuable business interest exists when an employee's blog shows him in a bad light and therefore tarnishes an employer's public image and goodwill would be moot if the blog was secured and intended to be confidential. For additional background, see John C. Barker, Note, *Constitutional Privacy Rights in the Private Workplace, Under the Federal and California Constitutions*, 19 HASTINGS CONST. L.Q. 1107, 1149 (1991-1992).
[56] *See* Barker, *supra* note 55, at 1157.
[57] Although *Hill* deviates somewhat from a strict scrutiny analysis, express and implicit constitutional rights are typically granted great deference. *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 10.1-10.10 (discussing analysis of fundamental rights under federal due process and equal protection analysis).

interests."[58] Pre-employment background checks, prior employer references, and on-the-job employee evaluations are examples of measures that gauge characteristics and qualifications relevant to the employer's business more accurately than blog reviews and do not even interfere with an employee's reasonable expectation of privacy outside the office. Moreover, such records offer better evidence of misconduct justifying termination.

Conclusion

The reality is that technology often advances before the law can react accordingly.[59] This does not mean that the law lacks the mechanisms necessary to cope with these new circumstances. However, in order for the law to evolve, these mechanisms must first be recognized and subsequently utilized. These observations aptly describe the current situation regarding doocing. Although California case law has rarely dealt with the issue, a legal framework is already available for public and private employees to address their blog-based terminations: California's right to privacy, in tandem with a *Tameny* lawsuit. Assuming that the privacy-friendly legal trend in California continues,[60] these wrongful doocing suits may soon be brought before the courts to decide whether or not an employee can still be fired on the (hot) spot.

[58] *See Hill*, 7 Cal. 4th at 38.
[59] *See* Isajiw, *supra* note 54, at 74-75.
[60] *See supra* note 49.